IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Wisconsin Resources Protection Council, Center for Biological Diversity, and Laura Gauger,

Plaintiffs,

v.

Case No. 11-cv-45

Flambeau Mining Company,

Defendant.

PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE EVIDENCE OTHER THAN A FEDERAL REGISTER NOTICE OR LETTER TO THE WISCONSIN GOVERNOR THAT WIS. ADMIN. CODE § NR 216.21(4) OR WIS. STAT. § 283.33 IS PART OF THE APPROVED WISCONSIN CLEAN WATER ACT PERMIT PROGRAM

Plaintiffs, through undersigned counsel, pursuant to Fed. R. Evid. 104, respectfully move the Court for an order excluding any evidence offered in this case related to whether Wis. Admin. Code § NR 216.21(4)(a)[1] or Wis. Stat. § 283.33[2] is part of

[1] In 1998, this subsection was renumbered without amendment from Wis. Admin. Code § NR 216.21(3)(a). The renumbering is immaterial. Plaintiffs use Wis. Admin. Code § NR 216.21(4)(a) to refer to any prior numbering of the same provisions. The regulation states:

> **(4)** OTHER ENVIRONMENTAL PROGRAMS. If one of the following conditions is met, the department may determine that a facility is in compliance with permit coverage required under s. 283.33, Stats., and will not be required to hold a separate permit under s. 283.33, Stats.:
>
> **(a)** The storm water discharge is in compliance with a department permit or approval, which includes storm water control requirements that are at least as stringent as those required under this subchapter.

the State of Wisconsin's water pollution discharge permit program under 33 U.S.C. § 1342, other than one of the two United States Environmental Protection Agency ("EPA") documents through which approval of a 33 U.S.C. § 1342 program revision can be made: a Federal Register notice or a letter from the EPA Administrator to the State's Governor or designee.

INTRODUCTION

This is a case filed under the citizen suit enforcement provision of the Federal Water Pollution Control Act, commonly known as the Clean Water Act. 33 U.S.C. § 1365. Plaintiffs allege that the defendant, Flambeau Mining Company ("FMC"), has discharged pollutants without the permit required by 33 U.S.C. §§ 1311(a) and 1342. Compl. ¶¶ 40, 46- 51 (Dkt # 1). In response, Defendant asserts an affirmative defense that it has met the Clean Water Act's requirements and has a "permit shield" because,

---

[2]Wis. Stat. § 283.33, in relevant part, states:

> **(1)** REQUIREMENT. An owner or operator shall obtain a permit under this section for any of the following:
>
> **(a)** A discharge from a discernible, confined and discrete conveyance of storm water associated with an industrial activity, including construction, that meets criteria in rules promulgated by the department.
>
> . . .
>
> **(d)** A discharge of storm water from a facility or activity, other than a facility or activity under pars. (a) to (cr), if the department determines that the discharge either contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the state.
>
> …
>
> **5)** OTHER DISCHARGERS. A person who is required to obtain a permit under sub. (1) (a) or (d) may apply for an individual permit or request coverage under a general permit issued by the department under s. 283.35.
>
> . . .

pursuant to 33 U.S.C. § 1342(k), it has complied with a state mining permit that is "issued pursuant to" 33 U.S.C. § 1342. *See* Answer ¶ 40, Affirmative Defenses ¶ 1 (Dkt. # 6).

Although there is no question that FMC has a permit regulating various mining activities issued pursuant to the state's mining laws, *i.e.*, Wis. Stat. ch. 293, a state mining permit is not a Clean Water Act permit. In its summary judgment briefing, FMC argued that that its state mining permit issued under Wis. Stat. ch. 293 is the legal equivalent of a state stormwater permit issued under Wis. Stat. § 283.33, which FMC argues is approved by EPA pursuant to 33 U.S.C. § 1342 and, therefore, based on the language of Wis. Admin. Code § NR 216.21(4)(a) (which FMC argues is also approved by EPA), FMC does not need any other permit to discharge pollutants into the waters of the State. *See e.g.*, Dkt. # 58 at 10-11. But, FMC misses the point: Under state law (that is, Wis. Admin. Code § NR 216.21(4)(a)), a ch. 293 mining permit *may* suffice in meeting the requirements of § 283.33; but, unless § 283.33 and NR 216.21(4)(a) have been approved by the EPA as part of the state's 33 U.S.C. § 1342 permit program, there can be no possible claim that a permit issued under ch. 293 meets the federal requirements under the Clean Water Act's National Pollution Discharge Elimination System ("NPDES") program, codified at 33 U.S.C. § 1342.[3] This case raises a federal question under the Clean Water Act, not a claim under a state permitting program.

---

[3] As Plaintiffs have argued, only NPDES permits may be used to authorize the point-source discharge of pollutants under the Clean Water Act, and any state regulation that purports to use other types of permits is void as a matter of federal law and cannot provide a § 402(k) permit shield. *See* Pls' Resp. to Def's Mot. for S.J. at pp. 16-21 (Dkt. # 99).

While EPA has delegated authority to Wisconsin Department of Natural Resources ("DNR") to issue federal Clean Water Act discharge permits, only if DNR issues discharge permits under its EPA-approved program pursuant to 33 U.S.C. § 1342 does the permit satisfy the *federal* Clean Water Act permit requirement. 33 U.S.C. § 1342(k). In order for the permit issued under either §283.33, or under any other alternative permitting program (as authorized by Wis. Admin. Code § NR 216.21(4)(a))[4], to meet the federal requirements of a Clean Water Act discharge permit required by 33 U.S.C. § 1342, the EPA must have approved those state laws as part of the state's Clean Water Act permit program.[5]

For FMC to prove that it is entitled to a Clean Water Act permit shield, FMC must show that its discharges are authorized under a permit issued pursuant to Wisconsin's EPA-approved 33 U.S.C. § 1342 permit program. 33 U.S.C. § 1342(k). Assuming for purposes of this motion that FMC's activities are covered and authorized by the state mining permit, FMC must nonetheless show that the state mining permit is "issued pursuant to" 33 U.S.C. § 1342 by proving that:

1. Wis. Admin. Code § NR 216.21(4) is approved pursuant to 33 U.S.C. § 1342 to allow a state mining permit to substitute for a permit under Wis. Stat. § 283.33; and

2. Wis. Stat. § 283.33 is approved pursuant to 33 U.S.C. § 1342 as the basis for issuing federal water pollution discharge permits.

---

[4] Wis. Admin. Code § NR 216.21(4)(a) provides authority for the DNR to issue an alternative permit if the permit is at least as stringent as the criteria under Wis. Stat. § 283.33 under state law.

[5]The permit issuance must also comply with the substantive and procedural requirements of 33 U.S.C. § 1342 and EPA's implementing regulations, but those additional requirements are not at issue in this motion.

Thus, FMC's state mining permit could only be relevant in this case if Wis. Admin. Code § NR 216.21(4) and Wis. Stat. § 283.33 were approved by the EPA as part of Wisconsin's approved 33 U.S.C. § 1342 permit program.

This motion addresses the evidence that can be admitted to show that the state mining permit is issued "pursuant to" the state's EPA-approved 33 U.S.C. § 1342 permit program. Specifically, this motion seeks to exclude extrinsic evidence of what state statutes and regulations the EPA has approved as part of Wisconsin's Clean Water Act permitting program "pursuant to" 33 U.S.C. § 1342. Evidence beyond what the EPA requires to show that a program has been approved should not be admitted.

ARGUMENT

Not all state laws are part of Wisconsin's 33 U.S.C. § 1342 permit program. Only those statute statutes and regulations that were explicitly submitted to the EPA, covered by a Wisconsin Attorney General's Opinion, and expressly approved by EPA are part of the state's 33 U.S.C. § 1342 permit program. As set forth below, EPA's explicit approvals of state laws as part of the state's permit program—and of any revisions to that program—must be in through one of two types of written approval. Therefore, pursuant to Fed. R. Evid. 602, 701, 802 and 1002, Plaintiffs seek to limit the evidence FMC can offer to show that EPA has actually approved the state laws upon which FMC bases its claim that it possesses the requisite permit and its 33 U.S.C. § 1342(k) "permit shield" defense that its state mining permit was issued as part of the state's 33 U.S.C. §

1342 permit program to only two specific documents: (1) a Federal Register notice and (2) a letter from the EPA Administrator to the State's Governor or designee.

I. Wisconsin's Permit Program Under 33 U.S.C. § 1342 Includes Only Those Provisions of State Law That Have Been Subject to the Submittal and Approval Process in The Statute and EPA's Implementing Regulations.

The relevant question for purposes of assessing whether the state mining permit is "issued pursuant to [33 U.S.C. § 1342]" is what Wisconsin state law components and procedures are part of the permit program under 33 U.S.C. § 1342.[6] If FMC's mining permit was issued under state laws that are not part of Wisconsin's 33 U.S.C. § 1342 permit program, the mining permit cannot be "issued pursuant to" 33 U.S.C. § 1342 within the meaning of 33 U.S.C. § 1342(k).

To determine which state laws are part of the state's 33 U.S.C. § 1342 permit program, the Court must look to the process by which a state must develop and submit its permit program and for the EPA to approve that program under 33 U.S.C. § 1342. If those procedures were not followed for any specific state law—here, Wis. Stat. § 283.33 and Wis. Admin. Code § NR 216.21(4)(a)—then necessarily any permit issued pursuant to those state law provisions does not satisfy the requirements in 33 U.S.C. § 1342(k) that it be "issued pursuant to" 33 U.S.C. § 1342.

A. The Statute Requires That All Statutes, Regulations, and Other Components of a State's 33 U.S.C. § 1342 Permit Program Be Submitted And Expressly Approved By EPA.

---

[6] The Court would also have to determine that FMC's mining permit was issued pursuant to the substantive and procedural requirements of 33 U.S.C. § 1342, but, that is not at issue in this motion.

A state's permit program under 33 U.S.C. § 1342 is limited to the four corners of the state's submittal and the EPA's approval. The permitting "program" refers to a finite set of laws and program elements that are explicitly set forth and covered by a submittal by the state's governor and, separately, also covered by a state attorney general's opinion. Pursuant to 33 U.S.C. 1342(b), the governor of a state seeking to have a Clean Water Act permitting program "may submit to the [EPA] Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact." *See also* 40 C.F.R. §§ 123.21, 123.22 (EPA's regulations establishing requirements and procedures for approval of state permit programs). That submission must include each state statute or regulation that the state intends to include in its permitting program. 40 C.F.R. § 123.21(a)(5). In addition to that complete description of the state's program, the state must also submit "a statement from the attorney general… that the laws of such State… provide adequate authority to carry out the described program." 33 U.S.C. § 1342(b); 40 C.F.R. § 123(a)(3). That is, the state attorney general must specify in an opinion that the state laws submitted as part of the governor's "full and complete description of the program" provide adequate legal authority to carry out the 33 U.S.C. § 1342 program.

Once the governor submits a complete set of state statutes and regulations and the state's attorney general opinions that the regulations are sufficient to carry out the permit program, the EPA Administrator must consider the submissions, hold a public hearing, and approve "the submitted program" if the statutes and regulations submitted by the governor and covered by the attorney general's opinion meet certain substantive requirements related to permit terms, permit modification and termination procedures, public participation process, and enforcement procedures. *See* 33 U.S.C. § 1342(b)(1)-(7), (c)(1)-(2); 40 C.F.R. §§ 123.21(a)(3), (5), (b), (e), 123.61(b), (c).

After the EPA approves the specific submission by the state, any revisions to that program—such as changes to state statutes or regulations that the state wishes to rely upon in its permit program—must be submitted to EPA through a similar process. 40 C.F.R. § 123.62. To revise its program after approval by EPA, the state must "submit a modified program description, Attorney General's statement, Memorandum of Agreement or such other documents as EPA determines to be necessary under the circumstances." 40 C.F.R. § 123.62(b)(1). EPA then reviews the state submittal and follows one of two approval procedures depending on whether the state's proposed program revision is "substantial." If the revision is "substantial," EPA undertakes a process similar to notice and comment rulemaking. EPA first publishes public notice in the Federal Register and state newspapers and allows at least 30 days for the public to comment. 40 C.F.R. § 123.62(b)(2). For "substantial revisions," notice of EPA's approval of the state's program revision is published in the Federal Register. 40 C.F.R. § 123.62(b)(4). If the revision is not "substantial," there is no public notice and comment process, but the revision is also not effective until there is written EPA approval through a letter from the Administrator to the State Governor or his designee. 40 C.F.R. § 123.62(b)(4).

If there were any doubt that an approval of a state statute or regulation as part of the state's 33 U.S.C. § 1342 permit program requires an explicit, affirmative, determination by the EPA, the judicial review provisions in the Clean Water Act confirm this fact. Pursuant to 33 U.S.C. § 1369(b)(1)(D), the EPA's determinations "as to a State permit program submitted under section 1342(b)" is reviewable by petitioning the Court of Appeals for review within 120 days. In fact, this is the only opportunity to test the lawfulness of any EPA approval, or disapproval. *See* 33 U.S.C. § 1369(b)(2) (prohibiting review in any civil or criminal proceeding). If EPA could approve or disapprove portions of the state's permit program by omission, or if a state could revise its statutes or regulations after EPA has approved them without having to seek EPA approval of those revisions, the judicial review procedures would be circumvented.[7]

B. To be Part Of Wisconsin's 33 U.S.C. § 1342 Permit Program, the State laws FMC Relies On Would Have Gone Through The Revision And EPA Approval Process as a Modification Under 40 C.F.R. § 123.62.

Where, as here, a state regulation is promulgated after the state's 33 U.S.C. § 1342 permit program has been approved by EPA, the state must submit the regulation to EPA, and EPA must explicitly approve it, for the regulation to be a revision to the state's 33 U.S.C. § 1342 permit program. 40 C.F.R. § 123.62. Unless and until that process is followed, the state law revision has no federal effect on and cannot revise the state's previously-approved 33 U.S.C. § 1342 permit program. 65 Fed. Reg. 66502, 66508 -09 (Nov. 6, 2000) (stating that "revisions to State 33 U.S.C. § 1342 permit programs *do*

[7] Indeed, if EPA had approved Wis. Stat. § 283.33 or Wis. Admin. Code § NR 216.21(4)(a) as part of Wisconsin's EPA-approved 33 U.S.C. § 1342 permit program, a challenge would have been likely because the mining permit program and Wis. Stat. § 283.33 fail to meet all of the substantive and procedural requirements of 33 U.S.C. § 1342. *See* Dkt. # 109 ¶¶ 246-250; Dkt. # 99 at pp. 12-15; *also compare* Dkt. # 63-1 at p. 4 of 156 (permits issued pursuant to Wis. Stat. § 283.33 do not contain water quality based limitations) *with* 33 U.S.C. § 1342(b)(1)(A) (requiring permit programs under 33 U.S.C. § 1342 to require compliance with water quality standards (set forth in 33 U.S.C. § 1312)).

not become effective until approved by EPA (40 CFR 123.62(b)(4))" and concluding that provisions that EPA was not specifically approving at that time were not in effect under the approved program) (emphasis added); 65 Fed. Reg. 47,864, 47,869 (August 4, 2000) (same regarding revisions to Illinois' permit program).

The relevant regulation provides as follows:

> (a) Either EPA or the approved State may initiate program revision. Program revision may be necessary when the controlling Federal or State statutory or regulatory authority is modified or supplemented. The State shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its forms, procedures, or priorities. Grounds for program revision include cases where a State's existing approved program includes authority to issue NPDES permits for activities on a Federal Indian reservation and an Indian Tribe has subsequently been approved for assumption of the NPDES program under 40 CFR part 123 extending to those lands.
>
> (b) Revision of a State program shall be accomplished as follows:
>
> (1) The State shall submit a modified program description, Attorney General's statement, Memorandum of Agreement, or such other documents as EPA determines to be necessary under the circumstances.
>
> (2) Whenever EPA determines that the proposed program revision is substantial, EPA shall issue public notice and provide an opportunity to comment for a period of at least 30 days. The public notice shall be mailed to interested persons and shall be published in the Federal Register and in enough of the largest newspapers in the State to provide Statewide coverage. The public notice shall summarize the proposed revisions and provide for the opportunity to request a public hearing. Such a hearing will be held if there is significant public interest based on requests received.
>
> (3) The Administrator will approve or disapprove program revisions based on the requirements of this part (or, in the

> case of a sewage sludge management program, 40 CFR part 501) and of the CWA.
>
> (4) A program revision shall become effective upon the approval of the Administrator. Notice of approval of any substantial revision shall be published in the Federal Register. Notice of approval of non-substantial program revisions may be given by a letter from the Administrator to the State Governor or his designee.

40 C.F.R. § 123.62; *Andersen v. DNR*, 2011 WI 19 ¶38 (discussing EPA oversight of Wisconsin's revisions to the state's 33 U.S.C. § 1342 permit program); 65 Fed. Reg. 26,607, 26,608 (May 8, 2000) (discussing a proposed permit program revision by Wisconsin, including the fact that the state submitted the specific statutes and regulations is sought to have EPA approve in the revision); *see also, e.g.*, 65 Fed. Reg. 66,502 (approving in part and disapproving in part certain revisions to Wisconsin's NPDES program related to the Great Lakes pursuant to 40 C.F.R. § 123.62); *Sierra Club Mackinaw Chapter v. Dept. of Envtl. Quality*, 747 N.W.2d 321, 331 (Mich. Ct. App. 2008) (discussing an EPA approval of revisions to portions of Michigan's permit program by letter).

The statute and regulation at issue here, Wis. Stat. § 283.33 and Wis. Admin. Code § NR 216.21(4)(a)[8], post-date EPA's initial approval of the original Wisconsin 33 U.S.C. § 1342 program in 1974. *See Anderson v. DNR*, 2011 WI 19 ¶ 37 (noting Wisconsin obtained EPA's approval for its NPDES program on February 4, 1974); 1993 WI Act 16 § 2605 (creating Wis. Stat. §147.021 in 1993, later renumbered to § 283.33 by 1995 WI Act 227); Wis. Admin. Reg. No. 466 (October, 1994) (creating Wis. Admin. Code § NR 216.21, effective November 1, 1994). Thus, to be part of Wisconsin's 33 U.S.C. § 1342 permit program, and therefore for permits issued under those state laws to satisfy 33 U.S.C. § 1342(k), those state laws must have been submitted to EPA and EPA must have approved them pursuant to 40 C.F.R. § 123.62(b)(4) through either a Federal Register notice or a letter to the Governor (or his/her designee).[9] Such written decision by EPA would have further triggered the exclusive judicial review rights of any affected parties. 33 U.S.C. § 1369.

---

[8] Wis. Stat. § 283.33 establishes a stormwater permit alternative to the program for all other pollution discharges under Wis. Stat. § 283.31, and Wis. Admin. Code § NR 216.21(4)(a) purports to allow DNR to substitute other permits (where certain findings are made by DNR) in the place of a permit under Wis. Stat. § 283.33. If either of these is not approved by EPA as part of Wisconsin's 33 U.S.C. § 1342 program, then there can be no argument by FMC that a permit purportedly covered by NR 216.21(4)(a) satisfies Wis. Stat. § 283.33 and thereby is issued "pursuant to" the Clean Water Act under 33 U.S.C. § 1342(k).

[9] Based on EPA past practice, a transfer of permitting from one division within a state agency to another is considered a substantial change that must be approved through notice and comment procedures and published in a Federal Register notice. *See e.g.*, 50 Fed. Reg. 2669 (January 23, 1985) (undertaking this process before approving transfer of permitting authority between divisions within West Virginia's Department of Natural Resources). Since Wis. Admin. Code § NR 216.21(4)(a) purports to not only transfer permit issuance authority to other divisions of the Wisconsin DNR (or to another agency), but also substitute other substantive and procedural requirements in place of the EPA-approved permit program, it would certainly have been done through this notice and comment and Federal Register publication procedure also. Regardless, even if it had not, it would still have to be approved by a written letter to the Wisconsin Governor or his designee.

II. Only The Federal Register Notice or A Letter To the Wisconsin Governor Can Be Offered As Evidence That Wis. Stat. § 283.33 and Wis. Admin. Code § NR 216.21(4)(a) Are Part of Wisconsin's 33 U.S.C. § 1342 Permit Program.

Unlike the permit program set forth in Wis. Stat. § 283.31 (the state's approved NPDES program), Plaintiffs do not believe that Wis. Stat. § 283.33 or Wis. Admin. Code § NR 216.21(4)(a) has ever been approved by EPA pursuant to 40 C.F.R. § 123.62. Neither Plaintiffs nor FMC has been able to find any evidence of such approval.[10] At most, FMC has implied that EPA has approved those state law provisions because EPA has not voiced disapproval. *See e.g.*, Bertolacinni Supp Aff. ¶¶ 5-8 (Dkt. # 87) (stating that EPA Region 5 has reviewed NR 216 and that EPA's letter identifying "concerns or questions" did not include a reference to NR 216.21(4)(a), but not identifying any actual EPA approval of either Wis. Stat. § 283.33 or Wis. Admin. Code § NR 216.21); Def. Add'l FOF ¶¶ 34-36 (Dkt. # 81) (arguing that EPA has not disapproved of DNR's use of Wis. Admin. Code § NR 216.21). However, 40 C.F.R. § 123.62 requires explicit approval—not a lack of disapproval. To the extent that FMC continues to deny that it lacks a federal NPDES permit and to assert that it has a "permit shield" pursuant to 33 U.S.C. § 1342(k), it must provide evidence of EPA's approval of the state laws under which it actually possesses a permit.

---

[10] Throughout the discovery and dispositive motions in this case, FMC has made assertions that Wis. Stat. § 283.33 and Wis. Admin. Code § NR 216.21(4)(a) are approved by EPA, but never identified any evidence of such approval. *See* Def. Resp. PAPFOF, Dkt. # 244 (arguing that the mining permit is issued pursuant to the "EPA-approved NPDES permit program" but citing no actual EPA approval); Def. Resp. Pls. Mot. Sum J., Dkt. # 79 at p. 21 of 96 (asserting that "Since Wisconsin Administrative Code § NR 216.21(3)(a) (now renumbered 216.21(4)(a)) is a component of Wisconsin's federally-authorized permitting framework for storm water discharges from industrial activities, (DAFOF ¶ 36[, Dkt. # 81]) DNR's authorization of the Biofilter storm water discharge was done pursuant to Section 402 of the CWA" but citing no actual evidence of such approval).

There are three possible sources of such evidence: (1) testimony from an individual with first-hand personal knowledge of EPA's approval (*i.e.*, an EPA employee who participated in the approval); (2) second-hand evidence based on out-of-court statements—either testimony or documentary evidence—about an approval; or (3) one of the two necessary EPA approval documents required by 40 C.F.R. § 123.62(b)(4). There has been no disclosure under Rule 26(a) of any past or current EPA employee with purported first-hand knowledge of any such approval identified by FMC (*see* Dkt. # 13), nor has any such witness been made known through any other discovery in this case. Other witnesses suggested by FMC to address this issue—DNR staff or other individuals who were not involved directly with EPA's approval process in the 1990s—cannot satisfy Fed. R. Evid. 602 and 701 as having first-hand personal knowledge of EPA's approval. *See e.g.* Lynch Aff (Dkt. # 18-4) at ¶ 20 (claiming that *DNR*, not EPA, made "the decision to regulation storm water discharged under the Mining Permit pursuant to [NR 216.21(4)]."). Only a current or former EPA employee who participated in EPA's approval could offer admissible first-hand testimony—and no such witness has been identified in this case. Any second-hand testimony would be merely repeating information obtained from documents or oral statements, contrary to the hearsay rule. Fed. R. Evid. 802. Moreover, if the basis for such testimony is a document, testimony about it would be contrary to the best evidence rule. Fed. R. Evid. 1002. Thus, if EPA had actually approved Wis. Stat. § 283.33 and/or Wis. Admin. Code § NR 216.21(4)(a), absent first-hand testimony by an EPA employee who participated in the approval, the only admissible evidence of EPA approval pursuant to 40 C.F.R. § 123.62 would be the actual EPA approval document.

Therefore, the Court should enter an order barring any evidence of the EPA's approval of Wis. Stat. § 283.33 or Wis. Admin. Code § NR 216.21(4)(a) as revisions to Wisconsin's EPA-approved 33 U.S.C. § 1342 permit program other than any Federal Register notice or any authenticated letter from EPA to the Wisconsin Governor (or his designee).[11]

CONCLUSION

Wherefore, for the reasons set forth above, and for such other reasons as Plaintiffs may set forth in any responsive briefing or as the Court may deem appropriate, Plaintiffs respectfully request that the Court grant this motion in limine to exclude evidence related to whether Wis. Admin. Code § NR 216.21(4)(a) or Wis. Stat. § 283.33 is part of the State of Wisconsin's water pollution discharge permit program under 33 U.S.C. § 1342, other than one of the two EPA documents through which approval of a 33 U.S.C. § 1342 program revision can be made: a Federal Register notice or a letter from the EPA Administrator to the State's Governor or designee.

---

[11] Defendant has not produced any approval document in discovery. Nor have Plaintiffs' Freedom of Information Act requests of EPA or DNR, or discovery of DNR, produced any such document.

Respectfully submitted this 2nd day of March, 2012.

MCGILLIVRAY WESTERBERG & BENDER LLC

/s/David C. Bender
James N. Saul
Christa O. Westerberg
David C. Bender
Pamela R. McGillivray
McGillivray Westerberg & Bender LLC
211 S. Paterson Street, Suite 302
Madison, WI 53703
608.310.3560 (Ph)
saul@mwbattorneys.com
westerberg@mwbattorneys.com
bender@mwbattorneys.com
mcgillivray@mwbattorneys.com

Marc D. Fink
CENTER FOR BIOLOGICAL DIVERSITY
209 East 7th St.
Duluth, MN 55805
(218) 525-3884
mfink@biologicaldiversity.org

Daniel Mensher
PACIFIC ENVIRONMENTAL ADVOCACY CENTER
Lewis & Clark Law School
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6926
dmensher@lclark.edu

Counsel for Plaintiffs Wisconsin Resources Protection Council, Center for Biological Diversity, and Laura Gauger.

CERTIFICATE OF SERVICE

I hereby certify that I electronically submitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal to the parties of record registered through CM/ECF in this case.

__/s David C. Bender___________

David C. Bender